A

PP v. HAMID SHAMSI KAVISHASHI

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: B-05-161-06-2013 (IRN)]
24 MARCH 2015

CRIMINAL LAW: *Dangerous drugs – Trafficking – Suspicious image detected by scanning machine at airport turned out to be dangerous drugs – Accused seen*
C *attempting to transfer plastic package from one bag into another bag – Trial judge found prima facie case against accused – Accused found to be in possession of drugs independent of presumption under s. 37(d) of Dangerous Drugs Act 1952 – Accused acquitted of trafficking charge but convicted for offence of possession – Whether trafficking proved – Whether accused had cast reasonable doubt in prosecution's case*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal by prosecution – Accused person charged for trafficking in dangerous drugs – Suspicious image detected by scanning machine at airport – Accused person seen attempting to transfer plastic package from one bag into another bag – Whether knowledge could be inferred – Defence of no knowledge and innocent carrier – Whether probable – Whether prima facie case*
E *proven – Dangerous Drugs Act 1952, s. 39B(2)*

At the Kuala Lumpur International Airport, the respondent, an Iranian national, was seen pushing two bags on a trolley; one was red while the other was black. A suspicious image was detected when the respondent placed the
F black bag on the scanning machine. While waiting for the narcotics officer to arrive at the customs office, the customs officer on duty ('SP3') saw the respondent trying to transfer a plastic packet from the black bag to the red bag. SP3 managed to stop him from doing so. The black bag was examined and later found to contain 12 plastic packets containing white crystalline substances concealed at the bottom section of the bag. The respondent was
G charged at the High Court for trafficking in 872.4g of methamphetamine, an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge found that a *prima facie* case of trafficking had been made out against the respondent and that the respondent was in possession of the drugs independent of the presumption under s. 37(d) of the DDA. The respondent
H was called to enter his defence. The respondent denied knowledge of the drugs inside the black bag and maintained that he was an innocent carrier. In his defence, the respondent contended that the red bag was his but while in Iran, one Peyman had passed him the black bag which allegedly contained some clothes for him to wear in Kuala Lumpur and he was to pass the bag
I to one Jaafar upon his arrival in Malaysia. The respondent called one Davood Jafar ('SB2') to support his defence, who confirmed that he had heard Peyman telling the respondent the same. At the end of the trial, the trial judge found that the respondent had raised a credible doubt as to whether

he had knowledge of the drugs. However, the respondent was found to have had custody and control of the drugs and that by the operation of s. 37(d) of the DDA, he was deemed to be in possession of the drugs. The respondent was acquitted of the trafficking charge but was convicted for the offence of possession under s. 12(2) read with s. 39A(2) of the DDA and was sentenced to 12 years imprisonment and 12 strokes of the rotan. Hence, the present appeal by the prosecution. The prosecution argued that the trial judge erred in finding that the respondent had cast a reasonable doubt in the prosecution's case in respect of the trafficking charge.

Held (allowing appeal; setting aside order of acquittal and discharge; and sentencing respondent to death)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The reason why the trial judge found knowledge to be proved was because the respondent was 'calm and collected' when he placed the two bags on the scanning machine. This, according to the trial judge, was evidence that he was completely ignorant of the presence of the drugs. The reasoning was seriously flawed. If knowledge, and therefore possession, had not been proved, Her Ladyship should not even have convicted the respondent of the offence of possession under s. 12(2) read with s. 39A(2) of the DDA because without proof of knowledge, what was left of the prosecution's case would be physical possession only, which was not a crime. Yet, Her Ladyship proceeded to find the respondent guilty of the offence. (para 32)

(2) The trial judge merely made fleeting references to the evidence of SP3 that the respondent tried to transfer the plastic packets from the black bag to the red bag while he was alone in the examination room. The trial judge did not test it against the respondent's claim that he had no knowledge of the drugs. This was crucial and material evidence and relevant under s. 8 of the Evidence Act 1950 and by virtue of s. 9 of the same Act, it was for the respondent to explain his conduct. However, no such explanation was forthcoming from the respondent other than to deny SP3's evidence, nor did the trial judge deal with the evidence. The trial judge's failure to consider this material part of the prosecution's evidence *vis-a-vis* the respondent's claim of no knowledge was a serious misdirection by way of non-direction rendering Her Ladyship's judgment defective and liable to be set aside. The respondent's defence of no knowledge should therefore have been rejected by the trial judge. (paras 41-43)

(3) No finding was made as to whether the respondent had rebutted the presumption of trafficking. The trial judge was plainly wrong in finding that the trafficking charge had not been proved by the prosecution. Given that the presumption of trafficking applied, the burden was on the respondent to prove that the drugs were not for the purpose of

A trafficking. Since no evidence in rebuttal was adduced by the respondent, he could not have succeeded in rebutting the presumption, even if the trial judge had addressed Her Ladyship's mind to the issue. (paras 51 & 52)

B **(4)** SB2 who was supposed to lend weight to the respondent's knowledge was clearly not a credible witness. Hence, what Peyman purportedly told the respondent about the black bag, its contents and the lock combination number was hearsay and ought to be disregarded. The purpose of introducing such evidence was to prove the truth of what Peyman told the respondent. The evidence must therefore be C disregarded notwithstanding that no objection was raised when it sought to be admitted. Since the respondent had a legal burden to prove, it was his duty to call Peyman to prove his claim that it was Peyman who handed the black bag to him to be passed to Jaafar. (paras 56 & 57)

D **(5)** It was unbelievable that the respondent's new clothings had to be put inside the black bag instead of his own red bag. It was a strange arrangement that it was Peyman and not the respondent himself who had to put the new clothings into the black bag and later to pass the bag minus the clothings to Jaafar on the respondent's arrival in Malaysia. (para 59)

E

Bahasa Malaysia *Translation Of Headnotes*

Di Lapangan Terbang Antarabangsa Kuala Lumpur, responden, seorang warganegara Iran, dilihat menolak dua buah beg di atas sebuah troli, satu berwarna merah manakala satu lagi berwarna hitam. Satu imej yang F meragukan dikesan semasa responden meletakkan beg hitam tersebut di atas mesin pengimbas. Sementara menanti ketibaan pegawai-pegawai narkotik di pejabat kastam, pegawai kastam bertugas ('SP3') melihat responden cuba memindahkan satu bungkusan plastik dari beg hitam ke beg merah. SP3 berjaya menghentikannya daripada berbuat sedemikian. Beg hitam tersebut diperiksa G dan didapati mengandungi 12 bungkusan plastik mengandungi serbuk kristal berwarna putih yang disembunyikan di bahagian bawah beg tersebut. Responden dipertuduh di Mahkamah Tinggi kerana mengedar 872.4g methamphetamine, satu kesalahan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Hakim bicara mendapati bahawa satu kes *prima facie* berjaya dibuktikan terhadap responden dan bahawa responden memiliki dadah H tersebut tanpa anggapan di bawah s. 37(d) ADB. Responden dipanggil membela diri. Responden menafikan pengetahuan mengenai dadah dalam beg hitam tersebut dan menyatakan bahawa dia adalah pembawa tidak bersalah. Dalam pembelaannya, responden menghujahkan bahawa beg merah tersebut adalah miliknya tetapi semasa di Iran, seorang yang bernama Peyman telah I memberikan beg hitam tersebut kepadanya yang dikatakan mengandungi beberapa helai pakaian untuk dipakai oleh responden di Kuala Lumpur dan dia perlu memberikan beg tersebut kepada seorang yang bernama Jaafar setibanya dia di Malaysia. Responden memanggil seorang yang bernama

Davood Jafar ('SB2') untuk menyokong pembelaannya, yang mengesahkan bahawa dia ada terdengar Peyman memberitahu responden akan hal yang sama. Di penutup perbicaraan, hakim bicara memutuskan bahawa responden telah membangkitkan keraguan kredibel mengenai sama ada dia mempunyai pengetahuan tentang dadah tersebut. Walau bagaimanapun, responden didapati mempunyai kawalan dan jagaan dadah tersebut. Responden dibebaskan daripada pertuduhan pengedaran tetapi disabitkan atas kesalahan milikan di bawah s. 12(2) dibaca bersama-sama dengan s. 39A(2) ADB dan dijatuhkan hukuman penjara 12 tahun dan 12 sebatan rotan. Oleh itu, rayuan ini oleh pihak pendakwaan. Pihak pendakwaan menghujahkan bahawa hakim bicara khilaf dalam memutuskan bahawa responden telah membangkitkan keraguan munasabah dalam kes pendakwaan berkenaan pertuduhan pengedaran.

Diputuskan (membenarkan rayuan; mengenepikan perintah pelepasan dan pembebasan; dan menjatuhkan hukuman mati ke atas responden)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Alasan mengapa hakim bicara memutuskan bahawa pengetahuan telah dibuktikan adalah kerana responden tenang semasa dia meletakkan kedua-dua beg tersebut di atas mesin pengimbas. Ini, menurut hakim bicara, adalah keterangan bahawa dia tidak tahu mengenai kehadiran dadah tersebut. Alasan ini adalah cacat. Sekiranya pengetahuan, dan dengan itu milikan, tidak dibuktikan Yang Arif tidak sepatutnya mensabitkan responden atas kesalahan milikan di bawah s. 12(2) dibaca bersama-sama dengan s. 39A(2) ADB kerana tanpa bukti pengetahuan, apa yang tinggal untuk kes pendakwaan adalah milikan fizikal sahaja, yang bukan merupakan satu jenayah. Namun, Yang Arif tetap memutuskan bahawa responden bersalah atas kesalahan tersebut.

(2) Hakim bicara sekadar membuat sekilas rujukan terhadap keterangan SP3 bahawa responden cuba memindahkan bungkusan-bungkusan plastik tersebut dari beg hitam ke beg merah semasa dia bersendirian dalam bilik pemeriksaan. Hakim bicara tidak mengujinya dengan dakwaan responden bahawa dia tidak mempunyai pengetahuan mengenai dadah tersebut. Ini adalah keterangan yang penting dan material serta relevan di bawah s. 8 Akta Keterangan 1950 dan di bawah s. 9 Akta yang sama, responden perlu membuktikan perlakuannya. Walau bagaimanapun, penjelasan sedemikian tidak dikemukakan oleh responden melainkan untuk menafikan keterangan SP3, dan hakim bicara juga tidak mempertimbangkan keterangan ini. Kegagalan hakim bicara untuk mempertimbangkan bahagian material keterangan pihak pendakwaan dengan dakwaan responden mengenai ketiadaan pengetahuan adalah satu salah arahan melalui ketidakarahan yang menjadikan penghakiman Yang Arif cacat dan boleh diketepikan. Pembelaan responden mengenai ketiadaan pengetahuan haruslah, dengan itu, ditolak oleh hakim bicara.

(3) Tiada dapatan yang dibuat mengenai sama ada responden telah menyangkal anggapan pengedaran. Hakim bicara jelas terkhilaf dalam memutuskan bahawa pertuduhan pengedaran gagal dibuktikan oleh pihak pendakwaan. Memandangkan anggapan pengedaran terpakai, beban terletak pada responden untuk membuktikan bahawa dadah tersebut bukanlah untuk tujuan pengedaran. Oleh kerana tiada keterangan menyangkal yang dikemukakan oleh responden, dia sepatutnya tidak boleh berjaya dalam menyangkal anggapan, jika pun hakim bicara tidak mengarahkan minda beliau terhadap isu tersebut.

(4) SB2 yang sepatutnya menyokong keterangan responden mengenai ketiadaan pengetahuan jelas bukan seorang saksi kredibel. Oleh itu, apa yang kononnya Peyman beritahu kepada responden mengenai beg hitam tersebut, kandungannya dan kombinasi nombor kunci adalah dengar cakap dan sewajarnya diketepikan. Tujuan mengemukakan keterangan sedemikian adalah untuk membuktikan kebenaran apa yang Peyman beritahu kepada responden. Keterangan mestilah diketepikan walaupun tiada bantahan yang dibangkitkan semasa ia dipohon untuk diterima. Oleh kerana responden mempunyai beban di bawah undang-undang untuk membuktikan, adalah tanggungjawabnya memanggil Peyman untuk membuktikan dakwaannya bahawa Peyman yang memberikan beg hitam tersebut untuk diserahkan kepada Jaafar.

(5) Adalah tidak boleh dipercayai bahawa pakaian-pakaian baharu responden perlu dimasukkan dalam beg hitam dan bukan beg merahnya. Adalah satu aturan yang pelik bahawa Peyman dan bukan responden sendiri yang memasukkan pakaian-pakaian baharu tersebut dalam beg hitam tersebut dan kemudiannya menyerahkan beg tersebut tanpa pakaian-pakaian kepada Jaafar setibanya responden di Malaysia.

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Baharom v. PP [1960] 1 LNS 9 HC ***(refd)***

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***

Chu Tak Fai v. PP [1998] 4 CLJ 789 CA ***(refd)***

Leow Nghee Lim v. Regina [1955] 1 LNS 53 ***(refd)***

Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***

Liew Siew & Anor v. PP [1969] 1 LNS 90 HC ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyd's Rep 403 ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***

PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***

PP v. Chin Yoke [1939] 1 LNS 66 HC ***(refd)***

PP v. Hla Win [1995] 2 SLR 424 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 167, 180(4), 182A(1), 277
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), 37(da)(xvi), 37A, 39A(2)
Evidence Act 1950, ss. 8, 9

For the appellant - Muhamad Yasser Mohd Nasri; DPP
For the respondent - Ameenuddin Mohamed Ibrahim; M/s Ameen Harbhajan & Co

[Appeal from High Court, Shah Alam; Criminal Trail No: 45A-121-2010]

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The respondent, an Iranian national was charged with trafficking in a dangerous drug and the charge against him was as follows:

> Bahawa kamu pada 18 Mac 2010, lebih kurang jam 9.30 malam, di Kaunter Pemeriksaan Kastam "A", Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 872.4 gram, dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial he was acquitted of the trafficking charge but convicted of the offence of possession under s. 12(2) read with s. 39A(2) of the Dangerous Drugs Act 1952 ('the DDA') and sentenced to 12 years imprisonment and 12 strokes of the rotan. Presumably the learned trial judge acted under s. 167 of the Criminal Procedure Code ('the CPC') which provides as follows:

> 167. If in the case mentioned in section 166 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

[3] The Public Prosecutor is dissatisfied with the decision, hence this appeal. Having heard arguments from both sides on 25 November 2014 we allowed the prosecution's appeal, set aside the order of acquittal and discharge and convicted the respondent of the trafficking charge and sentenced him to death. These are our grounds for allowing the appeal.

[4] First, the salient facts. On 18 March 2010, customs officer Mohamad Aminuddin bin Abu Bakar (SP3) was on duty at scanning machine A of the Arrival Hall of the Kuala Lumpur International Airport ('the KLIA'). At about 9.30pm a fair-skinned male person later identified as the respondent walked straight towards the scanning machine where SP3 was on duty. The respondent had just arrived from Doha by Qatar Airways Flight QR622. He had a return flight to Iran on 24 March 2010 as can be seen from his e-ticket at exh. P20.

[5] The respondent had two bags with him, one black and the other red which he was pushing on a trolley. He dutifully placed the two bags on the scanning machine without being told to do so. The first to be scanned was the red bag. Nothing suspicious was seen on the screen but when the black bag passed through the scanning machine, a suspicious dark greenish image was seen by SP3 at the lower section of the bag.

[6] SP3 instructed the respondent to bring the black bag to the examination counter A. At the same time he asked the respondent to produce his passport. On inspection, SP3 found the name on the passport to match with the name on the respondent's baggage tag. He instructed the respondent to open the bag, which the respondent did by turning the combination numbers of the lock. He was then asked to take out the clothings inside the bag. After the bag had been emptied of the clothings, SP3 scanned the bag again and the suspicious image that he saw earlier was still visible.

[7] He then instructed the respondent to put back the clothings into the black bag and to follow him to the CCP1 office. In the office the respondent was asked to sit down, with the two bags placed in front of him. SP3 then called his superior officer who in turn called for an officer from the narcotics unit to deal with the case. While waiting for the narcotics officer to arrive, SP3 saw the respondent trying to transfer a plastic packet from the black bag to the red bag. SP3 stopped the respondent from doing so and told him to put back the plastic packet into the red bag, which the respondent did. In re-examination SP3 testified that the plastic packet was still in the respondent's hand when he stopped him.

[8] At the time of the incident, SP3 was outside the examination room but he could see what the respondent was doing through the glass window. Furthermore he was keeping watch on the respondent. SP3 was subjected to intensive cross-examination on this incident and it is clear from the record that he stood his ground and acquitted himself well.

[9] The defence version of the incident as put to SP3 was that what the respondent took out from the black bag was a blanket and not a plastic packet. Counsel even went so far as to put to SP3 that it was SP3 himself who put the drug into the 12 plastic packets (p. 54 of the appeal record). In other words this was a case of a frame-up by SP3, a grave crime by any measure of culpability. The accusation was emphatically denied by SP3.

What counsel put to SP3 must be taken to be on the instruction of the respondent. Cross-examining counsel must understand that in putting crucial aspects of his client's case to any prosecution witness, he does so on instruction and not on a frolic of his own.

[10] After the arrival of the narcotics officer, the black bag was examined and was found to contain 12 plastic packets containing white crystalline substances hidden under a wooden plank wrapped with black cloth at the bottom section of the bag. According to SP3, when the 12 plastic packets were taken out from the bag the respondent almost fainted, or so he appeared to be.

[11] SP3 then marked the 12 plastic packets with the markings 'A1(1)' to 'A1(12)'. He took samples from the packet marked 'A1' in the presence of the respondent and tested it using a test kit. The samples tested positive for methamphetamine. The gross weight of the 12 plastic packets was 1,159g.

[12] The 12 plastic packets containing the white crystalline substances were sent to the Chemistry Department for analysis and were confirmed by the chemist Zulkefli bin Mohd Edin (SP6) to contain 872.4g of methamphetamine, a dangerous drug listed in the First Schedule of the DDA. There was no challenge to this part of the prosecution's evidence and is therefore deemed to be admitted. Possession without lawful authority of 50g or more of this type of drug would trigger the presumption of trafficking under s. 37(da)(xvi) of the DDA.

[13] On the strength of the prosecution's evidence, the learned trial judge found that a *prima facie* case of trafficking had been made out against the respondent. It was her finding that the respondent was in possession of the drugs independent of the presumption under s. 37(d) of the DDA. This must necessarily mean that knowledge of the existence of the drug had been established against the respondent. The respondent was thus presumed to be trafficking by virtue of s. 37(da). Accordingly she called upon the respondent to state his defence.

[14] We pause here to note that as the presumption of trafficking applied, the burden of proof shifted to the respondent to prove on the balance of probabilities that the drugs were not for the purpose of trafficking. When called upon to enter his defence, the respondent (SB1) chose to give evidence on oath. Essentially his explanation was that while he was in his hometown in Iran, he was invited by an old friend by the name of Peyman Zarhe ('Peyman') to work in a restaurant in Malaysia managed by one Jaafar. He accepted the invitation.

[15] He testified that he travelled by bus from his hometown to Bandar Abbas, also in Iran, where he coincidentally met two friends by the name of Mayson Sarlek and Davood Kalkoei. He said he only had a red bag with him at that time. As he was waiting for his flight to Kuala Lumpur at the Bandar Abbas airport, Peyman passed to him his flight ticket and also a black

bag (P12). He said he was told by Peyman that the bag contained some cloths for him to wear in Kuala Lumpur and that he was to pass the bag to Jaafar upon his arrival in Malaysia. Peyman also told him that the combination number to the lock was '000'.

[16] The respondent denied SP3's testimony that while inside the examination room at the KLIA, he tried to transfer the plastic packets from the black bag to the red bag. He denied any knowledge of the drugs inside the black bag.

[17] The respondent called Davood Jafar Kalkoei (SB2) to support his defence. In his evidence SB2 confirmed that the black bag was passed to the respondent by Peyman at the Bandar Abbas airport. He further testified that while they were at the airport, he heard Peyman telling the respondent that the black bag contained some new clothes for him to wear in Malaysia and that the bag was to be handed over to Jaafar upon his arrival in Kuala Lumpur.

[18] SB2 went on to tell the court that he came over to Malaysia specifically to testify for the respondent, who is his close friend. In cross-examination he was asked by the learned DPP to produce his passport to prove his claim that he was in Iran in 2010. He said he could not do so as the passport was stolen while he was visiting the respondent at the Kajang prison. He said a staff of the Kajang prison told him that a CCTV placed at the registration office showed that his passport was taken away by an unknown person.

[19] The long and short of the respondent's explanation is that he was an innocent carrier without knowledge. It was, it must be noted, not his defence that the drugs were not for the purpose of trafficking despite bearing the burden of rebutting the presumption of trafficking under s. 37(da) of the DDA. Having considered the respondent's explanation as supported by SB2, the learned trial judge found that the respondent had raised a 'credible doubt' in her mind as to whether the respondent had knowledge of the drugs. She was however satisfied that the respondent had custody and control of the drugs and that by operation of s. 37(d) of the DDA, he was deemed to be in possession of the drugs. This is how she dealt with the issue:

> In short, the defence has managed to raise a credible doubt as to whether the accused was in possession of the drug substance. But the totality of the evidence undoubtedly showed that the accused was in custody and control of the drug substance at that material time and in invoking the presumption under section 37(d) of the Act, I am satisfied that the accused is deemed to have in possession of the drug substance found in P12.

[20] We must say with respect that we find this finding by the learned judge to be rather confusing. First of all it is wholly inconsistent with her finding at the close of the prosecution's case as expressed in her grounds of judgment

that possession had been proved independent of the presumption under s. 37(d). Her earlier finding was that there was affirmative evidence of possession to invoke the presumption of trafficking under s. 37(da).

[21] Be that as it may, it is our considered view that the learned judge was right in finding that the presumption under s. 37(d) applied as the black bag was found in the respondent's custody and under his control at the time of his arrest. This provision reads as follows:

> In all proceedings under this Act or any regulation thereunder:
>
> (d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[22] There are two presumptions in this provision, first a presumption of 'possession' and second a presumption of knowledge as to the nature of the drug. The burden on the respondent was therefore to rebut the presumption by proving on the balance of probabilities firstly, that the drugs were not in his 'possession' and secondly that he had no knowledge of the nature of the drugs.

[23] The question then arises, how was the respondent to rebut the first of the two presumptions, namely 'possession', bearing in mind 'possession' for the purposes of criminal law involves two elements, namely physical possession and knowledge of the thing possessed: *Chan Pean Leon v. PP* [1956] 1 LNS 17; *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] 1 MLJ 54; *Leow Nghee Lim v. Regina* [1955] 1 LNS 53.

[24] These twin elements must be present before there can be 'possession'. Does this mean that the burden on the respondent was not only to rebut the mental element of 'possession' (which is knowledge) but also to rebut by proving on the balance of probabilities that he was not in physical possession of the drug, the physical element of possession? Interpreted literally that seems to be what s. 37(d) of the DDA mean to say.

[25] In our view that cannot be the proper construction to be given to the word 'possession' in the first part of s. 37(d) as it will lead to an absurdity because by being found in physical custody or control of the drug, the accused was already in physical possession of the drug. It is absurd in the circumstances to presume that he was in physical possession, which is another way of saying that he was in custody or control of the drug. Therefore the real intent and purport of s. 37(d) must be to presume, upon proof of custody or control, knowledge only which is the mental element of 'possession'. This is covered by the second part of the provision. The first part, if at all must be a reference to physical possession only.

[26] It is trite law that the quantum of proof required to discharge a statutory burden of proof is proof on the balance of probabilities and not the lower burden of merely to cast a reasonable doubt in the prosecution's case, which was the burden applied by the learned judge in dealing with the respondent's defence of no knowledge. In our judgment this was a serious misdirection on the burden of proof and had prejudiced the prosecution.

[27] Having invoked the presumption under s. 37(d) of the DDA, the learned judge went on to consider whether the respondent was trafficking in the drugs. There is nothing wrong with this approach, which is in fact in line with the decision of the Federal Court in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 where the apex court ruled that the prosecution can rely on the presumption under s. 37(d) to prove trafficking independent of the presumption under s. 37(da) of the Act. Arifin Zakaria FCJ (as His Lordship then was) delivering the judgment of the court lucidly explained the position thus:

> It ought to be stated at the outset that the decision in *Muhammed Hassan* only prohibits the use of double presumptions under ss. 37(d) and 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under section 37(d) of the Act and go on to rely on the presumption of trafficking under s. 37(da) of the Act to support a charge under section 39B of the Act. See *Tunde Apatira & Ors v. Public Prosecutor (supra); Msimanga Lesaly v. Public Prosecutor* [2005] 1 CLJ 398 (a decision of the Court of Appeal confirmed by this court in Federal Court Criminal Appeal No. 05-27-2004(K). *Conversely, the prosecution may rely on the presumption under s. 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s. 37(da)) that the accused was in fact trafficking in the dangerous drug.* (emphasis added)

[28] The reason why the learned trial judge resorted to the definition of trafficking under s. 2 of the DDA was because she found that the presumption of trafficking under s. 37(da) could no longer be invoked as the presumption under s. 37(d) had been invoked, citing *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273. This by the way was the position of the law prior to 15 February 2014, the date the present s. 37A took effect. Under this new provision the rule against double presumption has, for all practical purposes, been done away with.

[29] The learned judge however concluded that trafficking was not proved for the reason that the mere act of 'keeping', 'concealing' or 'carrying' set out in s. 2 of the DDA does not constitute 'trafficking' without further evidence of intention to trade and deal in them. She was not satisfied that the prosecution had proved 'actual trafficking'.

[30] At the hearing of this appeal the prosecution pursued only one ground, ie, that the learned trial judge erred in finding that the respondent had cast a reasonable doubt in the prosecution's case in respect of the trafficking charge. In dealing with the case at the conclusion of the trial, the learned trial judge started off by asking the following question:

> Now do I believe the accused and SD2's evidence or alternatively did they succeed in creating a reasonable doubt in the prosecution's case?

[31] She then proceeded to deal with the respondent's explanation and concluded as follows:

> Upon close scrutiny I find his story and his conduct before the scanning and after the recoveries of the drug inside the black bag seem to be probable. One could come to a conclusion that the reason he was calm and collected in mannerism when placing the bag inside the scanner machine and without been asked to by the officer on duty SP3, would infer that the accused is totally ignorant of the drug inside the black bag. The reason that he was behaving chaotic on recovery of the drug inside the black bag which he was then seen as about to faint could also be inferred that he was himself shocked and thus realized the fatal consequence. The methodical approach to the concealing of the drugs and sealing around it so that it will not easily opened to reveal the drugs would not alert the accused person to notice that there was something amiss. Further SP3 said in his evidence that he had to lug the wooden board off to yield the presence of the secret compartment and the demonstration done by SP5 during his giving of the evidence did show that one had really have to use force to pull the wooden board.
>
> Therefore in the circumstances I believe legally the effect of evidence from the defence witnesses gave rise to the following possibilities in relation to the issue of "knowledge" of the drug substance:
>
> > Where there is more than one set of inference which can be reasonably drawn from asset of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.
>
> In short, the defence has managed to raise a credible doubt as to whether the accused was in possession of the drug substance.

[32] Undoubtedly the reason why the learned judge found knowledge to be not proved was because the respondent was "calm and collected" when he placed the two bags on the scanning machine. This according to the learned judge is evidence that he was completely ignorant of the presence of the drugs. In our view the reasoning is seriously flawed. In the first place, if knowledge (and therefore 'possession') had not been proved, she should not even have convicted the respondent of the offence of possession under s. 12(2) read with s. 39A(2) of the DDA because without proof of knowledge, what was left of the prosecution's case would be physical possession only, which is not a crime. Yet she proceeded to find the respondent guilty of the offence.

[33] Secondly, evidence of being calm and collected is neither here nor there. If it were a factor to consider, all that a drug trafficker needs to do to avoid liability is to act innocent. The better he is at it, the better his chances of acquittal. In any event once custody or control is established, knowledge is presumed by s. 37(d) of the DDA. It is for the respondent in any event to prove that he had no knowledge of the drug.

[34] Quite apart from the question of whether the learned judge was right in law in finding that the respondent was only guilty of the offence of possession and not the capital offence of trafficking, the bigger question is whether the learned trial judge had considered all material evidence before finding that the trafficking charge had not been proved. This is tied to the learned judge's finding on the question of knowledge. The need to consider all the evidence at the conclusion of the trial is a mandatory requirement of s. 182A(1) of the CPC which stipulates as follows:

> 182A. (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[35] Consideration of all the evidence in the context of s. 182A(1) of the CPC not only means considering the accused's explanation but to test it against all material facts already established by the prosecution at the close of its case with a view to finding whether the accused has rebutted or explained the case that has been made out against him, which in the present case is trafficking. This is also implicit in s. 180(4) of the CPC which provides as follows:

> 180. (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which **if unrebutted or unexplained would warrant a conviction.** (emphasis added)

[36] In point of law, a *prima facie* case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side: See *PP v. Chin Yoke* [1939] 1 LNS 66; *PP v. Sukumaran Sundram* [1999] 4 CLJ 242; *Balachandran v. PP* [2005] 1 CLJ 85. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 the Federal Court laid down the following test to determine whether a *prima facie* case has been established:

> Put shortly, what the court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] CLJ 101 (Rep); [1983] 2 CLJ 10; [1983] 2 MLJ 232. If the answer to the question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[37] The Federal Court also held that the evidence led by the prosecution must be subjected to a maximum evaluation and the witnesses must be found to be credible witnesses and if the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused: See also *Tai Chai Keh v. PP* [1948] 1 LNS 122; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[38] As for the drawing of inferences, the then Malayan Court of Appeal in *Liew Kaling & Ors v. PP* [1960] 1 LNS 60 laid down the rule that before an inference can be considered to be a valid one it must comply with two conditions, namely:

(a) It must account for all the known facts; and

(b) It must be the only reasonable inference which will account for all these facts.

[39] In view of the stringent and high standard of proof required to establish a *prima facie* case, the accused must in order to earn an acquittal rebut or explain the case that has been made out against him. If any presumption of law applies, his duty is to rebut that presumption on the balance of probabilities. The respondent's explanation it will be recalled is that he had no knowledge of the drugs found in the black bag. It will also be recalled that the learned trial judge had accepted the prosecution's evidence that the drugs were in the respondent's custody and under his control, thereby triggering the presumption of knowledge under s. 37(d) of the DDA.

[40] Whether or not the respondent had succeeded in rebutting the presumption of knowledge is essentially a question of fact. We are mindful of the principle that an appellate court is always slow to interfere with findings of fact made by the trial court unless the court is convinced that it is wrong. We do not find it necessary to cite any authority for this trite and settled proposition of law.

[41] The question is whether the learned trial judge, in concluding that the respondent had no knowledge of the drugs had, as required by s. 182A(1) of the CPC considered all material evidence. One such evidence is the evidence of SP3 that the respondent tried to transfer the plastic packets from the black bag to the red bag while he was alone in the examination room. From her grounds of judgment, the learned judge merely made fleeting references to this part of the prosecution's evidence as can be seen at pp. 349, 366 and 369 of the appeal record, without testing it against the respondent's claim that he had no knowledge of the drugs.

[42] There can be no argument that this is crucial and material evidence and relevant under s. 8 of the Evidence Act 1950. By virtue of s. 9 of the same Act, it was for the respondent to explain his conduct: See *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19. But no such explanation was forthcoming from the respondent other than to deny SP3's evidence, nor did the learned judge deal with the evidence.

[43] In our view the learned judge's failure to consider this material part of the prosecution's evidence *vis-à-vis* the respondent's claim of no knowledge is a serious misdirection by way of non-direction rendering her judgment defective and liable to be set aside. The evidence is potent enough proof that the respondent knew about the drugs in the black bag. His defence of no knowledge should therefore have been rejected by the learned trial judge.

[44] The test applied by the learned trial judge in determining whether the respondent had knowledge of the drugs was whether the respondent's explanation had cast a reasonable doubt in the prosecution's case. Even assuming for a moment that the learned trial judge was right in applying the 'reasonable doubt' test rather than the 'balance of probabilities' test (given that the presumption under s. 37(d) applied), the principle is clear that it is only where the explanation is reasonable and probable that an acquittal is warranted.

[45] There is no dearth of authority on what 'proof beyond reasonable doubt' means. Suffice for us to cite two familiar authorities, the first being *Miller v. Minister of Pensions* [1947] 2 All ER 372 where Lord Denning said:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[46] The second case is *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 where Sharma J made the following observations:

> The following definition of "reasonable doubt" is often quoted:
>
> > It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

> It has again been said that "reasonable doubt" is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, **after you have fully investigated the evidence and compared it in all parts,** you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. **A reasonable doubt must be a doubt arising from the evidence** and cannot be an imaginary doubt or conjecture unrelated to evidence. (emphasis added)

[47] By failing to consider material and highly relevant evidence before her, the doubt that the learned judge entertained in relation to the respondent's knowledge of the drugs cannot in the circumstances be a reasonable doubt arising from the evidence. On our part, there is no doubt in our mind that the respondent knew about the drugs in the black bag. That in our view is the only reasonable inference that will account for all the known facts.

[48] There is another unsatisfactory feature of the judgment which we need to point out. In ruling that a *prima facie* case had been established against the respondent, it was the learned judge's firm finding that possession had been proved by affirmative evidence. This was precisely the reason why she invoked the presumption of trafficking under s. 37(da) of the DDA. This is apparent from her finding at p. 374 of the record of appeal, as follows:

> The next question is whether there is evidence of trafficking by the respondent in the said drug. In this case the amount of methamphetamine is 872.4 grams in weight, which is well in excess of 50 grams, thus triggering the statutory presumption of trafficking as provided in s. 37(da) of the Act.

[49] However, despite invoking the presumption, the learned judge completely failed to consider whether the presumption had been rebutted or otherwise by the respondent. Her focus obviously was to determine whether the respondent had succeeded in casting a reasonable doubt in the prosecution's case on the question of knowledge.

[50] The respondent's defence was nothing more than a bare denial, ie, that he did not even know that there were drugs in the black bag. Not surprisingly therefore, he adduced no evidence whatsoever to discharge his burden of proving that the drugs were not for the purpose of trafficking in rebuttal of the presumption under s. 37(da) of the DDA. This must as a matter of law be taken to mean that he had no evidence to rebut the presumption.

[51] To summarise what we have said thus far, the position of the case as we find it, is this. At the close of the prosecution's case the learned trial judge found possession to have been proved by affirmative evidence and therefore the respondent was presumed to be trafficking in the drugs (s. 37(da) of the

DDA). At the close of the defence case the learned judge found that knowledge (and therefore 'possession') had not been proved but because the drugs were in the respondent's custody and control, he was deemed to be in possession of the drugs (s. 37(d) of the DDA). Therefore he was guilty of the offence of possession under s. 12(2) read with 39A(2) of the DDA. No finding was made whether the respondent had rebutted the presumption of trafficking.

[52] Having regard to the evidence, we are of the humble view that the learned trial judge was plainly wrong in finding that the trafficking charge had not been proved by the prosecution. Given that the presumption of trafficking applied, the burden was on the respondent to prove that the drugs were not for the purpose of trafficking. But since no evidence in rebuttal was adduced by the respondent, he could not have succeeded in rebutting the presumption, even if the learned trial judge had addressed her mind to the issue.

[53] As for proof of trafficking without resorting to the presumption of trafficking under s. 37(da), the learned trial judge was right in relying on the presumption under s. 37(d) of the DDA: *PP v. Abdul Manaf Muhamad Hassan (supra)*. However we are of the view that she was wrong in finding that knowledge had not been proved. As we have said earlier, her failure to consider SP3's testimony that the respondent tried to transfer the drugs from the black bag to the red bag renders her judgment defective and cannot be allowed to stand.

[54] SB2 who was supposed to lend weight to the respondent's claim of no knowledge was clearly not a credible witness. He conveniently claimed to have lost his passport when asked to produce it. The passport was crucial evidence as it would support or demolish his evidence that he was with the respondent at the Bandar Abbas airport when Peyman purportedly passed the black bag to the respondent to be handed over to Jaafar in Kuala Lumpur.

[55] SB2's failure to produce his passport is compounded by the fact that the defence case on the identity of the other person who was with the respondent at Bandar Abbas airport was inconsistent with the defence version of the case that was put to the relevant prosecution witness. What was put to SP7 in cross-examination was that the other person was Dawood Careku. But SB2 who turned up in court and claiming to be that other person is Davood Jafar Kalkoei. There is no evidence that Dawood Careku and SB2 are one and the same person. In all likelihood SB2's evidence was a fabrication with the intention of casting doubts in the learned trial judge's mind as to the respondent's guilt.

[56] In any event what Peyman purportedly told the respondent about the black bag, its contents and the lock's combination number at the Bandar Abbas airport is hearsay and ought to be disregarded. It is obvious that the purpose of introducing such evidence was to prove the truth of what Peyman

told the respondent, ie, that the bag was to be handed over to Jaafar in Kuala Lumpur and that it had a combination number of '000'. This offends the rule against hearsay: See *Subramaniam v. PP* [1956] 1 LNS 115; [1956] MLJ 220 PC. The evidence must therefore be disregarded notwithstanding that no objection was raised when it was sought to be admitted: See *Malaysian National Insurance Sdn Bhd v. Malaysia Rubber Development Corp* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185; [1986] 2 MLJ 124 SC.

[57] Further, since the respondent had a legal burden to prove, it was his duty to call Peyman to prove his claim that it was Peyman who handed the black bag to him to be passed to Jaafar: See *Baharom v. PP* [1960] 1 LNS 9; [1960] 1 MLJ 249; *Liew Siew & Anor v. PP* [1969] 1 LNS 90; *Chu Tak Fai v. PP* [1998] 4 CLJ 789. Since Peyman was not called to give evidence, there is no way the court could verify the truth of what Peyman told him at Bandar Abbas airport, ie, that the black bag was meant for Jaafar and had a lock combination number of '000'.

[58] Even if the respondent's claim is true, the principle of wilful blindness would operate against him: See *PP v. Hla Win* [1995] 2 SLR 424. In that case Yong Pung How CJ quoted with approval the following passage by Professor Glanville Williams in his book '*Criminal Law*':

> ... the strict requirement of knowledge is qualified by the doctrine of willful blindness. This is meant to deal with those whose philosophy is: Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know.

[59] We find it unbelievable that the respondent's new clothings had to be put inside the black bag instead of his own red bag. We further find it a strange arrangement that it was Peyman and not the respondent himself who had to put the new clothings into the black bag and later to pass the bag minus the clothings to Jaafar on the respondent's arrival in Malaysia. We find no ring of truth in the story. It has to be a deliberate lie to mislead the court.

[60] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, we do not think that justice had been done to the prosecution. It is our finding that contrary to the learned trial judge's finding, the trafficking charge had been proved beyond any reasonable doubt. In *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 the Court of Appeal quoted with approval the following passage by Lord Pearce in *Onassis and Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep 403 at p. 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of

A a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded
B in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest of cases. Such matters are questions of degree.

[61] For all the reasons aforesaid we allowed the Public Prosecutor's appeal, set aside the order of acquittal and discharge in respect of the
C trafficking charge as well as the conviction under s. 12(2) of the DDA and substituted it with an order that the respondent be convicted of the trafficking charge. Pursuant to s. 277 of the CPC we ordered him to be sentenced to death by hanging.

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